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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1970

No.

MADALYN MURRAY O'HAIR, ET AL.,

Petitioners,

THOMAS O. PAINE, ET AL.,

Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

Petitioners, Madalyn Murray O'Hair, Richard F. O'Hair, and The Society of Separationists, Inc., pray that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fifth Circuit entered in this cause on September 22, 1970, affirming a dismissal of Petitioners Bill of Complaint by the United States District Court for the Western District of Texas, Austin Division.

OPINIONS BELOW

The opinion of the Court of Appeals is not yet officially reported but is printed at p. 18a of the Appendix to this petition. The Memorandum Opinion of the United States District Court, Western District of Texas, Austin Division, is reported in *312 Fed. Supp. 434*. (See Appendix p. 10a). The Order of the Three Judge Court, sitting in Austin, Texas, is not reported, but is printed at p. 9a of the Appendix to this petition.

JURISDICTION

The jurisdiction of this Court is invoked on the grounds that the United States Court of Appeals for the Fifth Circuit has decided a federal question in a way in conflict with applicable decisions of this Court, or has so far sanctioned a departure by a lower court, as to call for an exercise of this Court's power of supervision.

The judgment of the Court of Appeals is dated and was entered September 22, 1970. Jurisdiction of this Court is timely invoked under 28 U.S.C.A. sec. 2101 (c) and 28 U.S.C.A. sec. 1254 (1) in the light of Rule 19 1 (b) of the Rules of the Supreme Court of the United States.

QUESTIONS PRESENTED

1. Are the opinions of the Three Judge Court, District Court and Court of Appeals in such conflict with the Flast vs. Cohen decision of this Court as to invoke this Court's supervisory powers?

2. Did the lower courts depart so far from the rules in testing the sufficiency of Plaintiffs' Complaint as to call for the supervisory powers of this Court?

3. Did the lower courts err in affirming the validity of the "So Help Me God" portion of the oath required of the judiciary.

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

This case involves Article VI. Clause 3 and the First and Fourteenth Amendments to the Constitution of the United States, (see Appendix p. 2a), the NASA Authorization Act. P. L. 90 – 373 (82 Stat. 280), (see Appendix p. 3a), 28 U.S.C.A. sec. 2282, (see Appendix p. 8a).

STATEMENT OF THE CASE

Petitioners were Plaintiffs and Respondents were Defendants in the District Court.

This action was commenced by Plaintiff Madalyn Murray O'Hair in August 1969, seeking to enjoin the Administrator of the National Aeronautics and Space Administration (NASA) from further unlawful expenditures in support of prescribed religious activities in the manned space program. A Three-Judge Court was convened. On October 13, 1969, Plaintiffs filed a Motion to Dismiss, and after memoranda in support and in opposition to the Motion to Dismiss, the cause came on for argument before the Three-Judge Court on November 24, 1969.

On December 1, 1969, the Three Judge Court remanded the case, without opinion, to the jurisdiction of the single-judge District Court, holding that the action was not properly a matter for determination by a Three-Judge Court. On December 1, 1969, the same day of the remand order, the single judge District Court issued a *Memorandum Opinion* granting Defendants' Motion to Dismiss, and the two other judges concurred in the Memorandum Opinion.

Petitioners filed simultaneous timely appeals to the United States Court of Appeals, Fifth Circuit and to the Supreme Court of the United States. Respondents filed motions to dismiss in each instance. On April 6, 1970 the Supreme Court of the United States, per curiam, and without opinion, granted the motion to dismiss, and dismissed petitioners' appeal for want of jurisdiction under 28 U.S.C.A. Section 1253. The United States Court of Appeals, Fifth Circuit, under its Local Rule 18, on August 13, 1970, transferred the case to the summary calendar for disposition, and on September 22, 1970 affirmed the District Court's dismissal of complaint for failure to state a claim upon which relief could be granted. Petitioners, therefore, continue the prosecution of their appeal to this Court.

REASONS FOR GRANTING THE WRIT

The Petitioners, who were Plaintiffs below, seriously urge the granting of this Writ on the grounds that the courts below, beginning with the Three Judge District Court and ending with the United States Court of Appeals for the Fifth Circuit, have flagrantly ignored the direction and authority of this Court which was set forth in *Flast vs Cohen*, 392 U S 83, and *Board of Education of Central School Dist No 1, vs Allen*, 392 U S 236, as to call for an exercise of this Court's power of supervision. To permit the decisions of these courts to remain in their present posture will be to make a mockery of the popular conception of our system of justice. It is one thing for a party to receive an adverse ruling after the law has been fairly and objectively applied, but quite another when not only the party's contentions but also the law upon which he relies have been ignored, lifted out of context, and otherwise flaunted.

The Plaintiffs in this case initially filed their Bill of Complaint without the benefit of Counsel and while in some respects the language of the Complaint may not have been couched with the desired, but seldom achieved, preciseness, it did in every respect satisfy the requirements of Flast, but also went further by raising additional questions.

For instance, at paragraph six (6) of the complaint, taxpayer status is alleged, and at paragraph eleven (11), and at numerous other places in the Complaint, Plaintiffs complain of the spending of tax monies in derogation of the specific limitations of the First Amendment Establishment Clause. While in essence these are all the allegations Flast requires, Plaintiffs made many more which may or may not have legal merit, but in any event the sheer presence of superflous allegations in the Complaint should not inure to Plaintiffs' detriment.

The Three Judge District Court erred in holding that the case was not a proper one for determination by a three judge District Court, and the single-judge District Court likewise erred. The initial fault was with the decision of the Three Judge Court in that it effectively dictated dismissal by the single-judge District

Court since at the outset the District Court would have been impotent to grant the relief sought because the constitutionality of a statute was involved. Necessary to the decision of the Three Judge Federal Court was a finding that either the Plaintiffs did not have standing or that they had not set forth a claim upon which relief could be granted or that they did not present a substantial constitutional issue. Notwithstanding which of the positions the Three Judge Court may have taken, it would be without legal or meritorious foundation, because if Plaintiffs' Complaint satisfied the requirements of the Hast decision, it would not only confer standing but would likewise state a claim upon which relief could be granted and place in issue a substantial constitutional question.

We think it is clear that the single-judge District Court was merely acting as a conduit of expression for the Three Judge Court. Accordingly it follows as reasonable that the basis cited for dismissal of the Complaint is in fact the same basis upon which the Three Judge Court had acted in concluding that it was not a proper case for determination by a Three Judge District Court.

The single-judge District Court held in dismissing the Complaint that Plaintiffs had not stated a claim upon which relief could be granted. This holding presupposes a thorough examination of the Complaint, accepting all well pleaded allegations of fact as true and in the light most favorable to the Plaintiffs. A reading of the single-judge's *Memorandum Opinion* of Dismissal and of Plaintiffs' Complaint, readily negates the thoroughness of examination contemplated by the rules and the precedents of the Common Law.

> "In appraising the sufficiency of a complaint, the Court should follow the Rule that a complaint should not be dismissed for failure to state a claim unless it appears beyond doubt that the plaintiff can prove no set of facts." *Conley v. Gibson, 355 U. S. 41*, at page 45.

The single-judge District Court committed the error of lifting only those allegations and contentions from Plaintiffs' Complaint, and that language from the decisions of this Court, which fitted neatly into the niches of the predetermined result

to be reached. In addition, the Court, while supposedly testing the Complaint as on demurrer, improperly relied on and made finding of fact from Defendant Paine's *Affidavit in Support of Defendants' Motion for Summary Judgment*, which affidavit had been filed but, upon objection by Plaintiffs, Defendants promised that the affidavit would not be relied on. (See *Defendants' Reply to Plaintiff's "Memorandum to the Court in Respect to the Use of Affidavit of Defendant on Motion to Dismiss or in the Alternative for Summary Judgment"*). Even without such agreement reliance by the Court on the affidavit at this stage of the proceedings would have been improper. As an indication of such finding of fact and reliance by the Court on the affidavit for the purpose of negating Plaintiffs' claim, see page three and four of the Court's *Memorandum Opinion* where the Court states

> "To begin with, the religious statements of astronauts while on television were made by the astronauts as individuals and not as representatives of the United States government."

The Court commits additional errors in the same vain where it finds as a fact that

> " . . religious items carried by the astronauts were personal, and that the purpose of N.A.S.A. is obvious: it is solely to accomodate the astronauts, a perfectly legitimate task especially when one considers the seriousness of the mission."

While the language of the Court in this *Memorandum Opinion* is couched so as to receive wide popular acceptance, emotionalism has no place in our system of justice if the system is to survive. Plaintiffs in their argument before the Three Judge Court relied solely and exclusively on the Authority of the Flast decision. It is therefore interesting to note that Judge Roberts does not even mention the Flast decision anywhere in his *Memorandum Opinion* of Dismissal, but instead draws upon the dictum language of many other decisions to support an already determined position.

The government, in its briefs and memoranda has frequently attributed requirements to Flast which Plaintiffs do not understand Flast to impart. Most vividly in the *Memorandum in Support of Defendants' Motion to Dismiss or in the Alternative for Summary Judgment*, the government in discussing Flast speaks in terms of incidental expenditure of tax funds in the administration of an essentially regulatory statute, suggesting that Flast requires the showing of some huge monetary expenditure. Plaintiffs do not understand the Flast decision to hold this. The gravamen of Flast, in Plaintiffs' view, is that there must be an allegation of an unconstitutional exercise of legislative authority which legislative authority is specifically negated by some other section of the Constitution. Plaintiffs interpret the Flast decision as having considered and rejected the importance of the monetary amount where there is a specific constitutional prohibition of the spending. At page 103 of that opinion, this Court appears to have considered and adopted the 'three pence only' philosophy of James Madison as set forth in his famous Remonstrance Against Religious Assessments. The view that dollar amount is unimportant in First Amendment Establishment Clause cases seems to also gain support from the case of *Abington School District vs Schempp*, *374 U S Reports at page 229*, where Justice Douglas in his concurring opinion, stated:

> "Thus, the present regimes must fall under that clause [establishment clause] for the additional reason that public funds, though small in amount, are being used to promote a religious exercise. Through the mechanism of the State, all of the people are being required to finance a religious exercise that only some of the people want and that violates the sensibilities of others." (emphasis added)

But, assuming for the sake of argument that an allegation that a substantial amount is involved is required, Plaintiffs in their Complaint met this requirement to the same extent as the Plaintiffs in Flast.

The government's other arguments are primarily to the weight of their assumed evidence and not to the pleadings to which they are now limited. Plaintiffs are of the opinion that the Courts, including the Court of Appeals, afforded too much weight without independent examination to the government's positions and cited authorities and to this extent they erred in the abdication of their judicial responsibility as the sole determiner of the law.

The government, for example, concludes, and the lower Courts accept that Plaintiffs' complain of the personal religious acts of the astronauts, but this is not so. Nor do they complain at this time of the making available of facilities in order that the astronauts may freely engage in the exercise of their religious beliefs. They do complain, however, of the expenditure of tax monies for the official planning, production and staging of religious exercises, and for the transport of artifacts and the broadcast of religious doctrines which is not personal or spontaneous but which is calculated to promote and favor one religion over another in the eyes of the world and to violate the sensibilities of others.

Finally we reach the question of whether the lower courts erred in affirming the validity of the "So Help Me God" portion of the oath required of the judiciary.

The language "So Help Me God" required as an oath or affirmation of judges is a requisite to holding such office. The failure of one to affirm a belief mandatorialy excludes him from such service. Thus it is apparent that one cannot openly disavow a belief in diety and expect to serve as a justice in courts of the United States. The language "So Help Me God" constituting a part of the mandatory oath or affirmation in Section 453 of Title 28, U.S.C.A. is a religious test in that it exacts an affirmation of a belief in the accepted Supreme Being of the Judeo-Christian religion to the exclusion of all others and to the exclusion of those who reject the existence of one such being. As such the requirement is repugnant to Article VI, Clause 3 of the Constitution of the United States, which places specific constitutional restraint on the use of such religious test.

Additionally the requirement contravenes the Free Exercise and Establishment Clauses of the First Amendment and deprives Plaintiffs of life, liberty and property without due process of law, and denies to them equal protection of the laws. That the term "God" carries a religious connotation and none other is quite clear. *The Random House Dictionary of the English Language*, Unabridged Edition, defines "God" variously as follows:

> "1. the one Supreme Being, the creator and ruler of the universe. 2. the Supreme Being considered with reference to a particular attribute, the God of Battles. 3. one of the several deities, esp. a male deity, presiding over some portion of worldly affairs. 4. a supreme being according to some particular conception. 5. Christian Science, the Supreme Being considered with reference to the sum of His attributes. 6. an image of a deity, an idol. 7. any deified person or object."

The term deity is defined as:

> "1. a god or goddess. 2. divine character of nature; divinity. 3. the estate or rank of a god. 4. the character or nature of the Supreme Being, the deity of Christ. 5. a person or thing revered as a god or goddess. 6. the Deity, God, Supreme Being."

It is generally accepted without question that the God as it is used in connection with the questioned oaths has reference to the Christian God, or the Holy Trinity - the Father, Son and the Holy Ghost. Therefore, to exact an affirmation of belief in this God is to use the facilities of the Congress to promote the efficacy of one God over another and to deny to the non-believer the freedom of exercise of such belief. Plaintiffs do not suggest that the government need become hostile to religion as is so often suggested in cases seeking the maintenance of the Separation Principles of the Constitution. Yet they strongly urge that all coercive sanctions of the government should be stricken. Plaintiffs would have no quarrel with Section 453 if the use of "So Help Me God" was optional.

It has long been accepted that the mandatory or systematic exclusion of members of one's race from jury panels is unconstitutional. It has likewise become established that the forced requirement of belief in God to holding a public office or trust is unconstitutional as a denial of life, liberty or property without due process, or a denial of equal protection under the laws. *Schongurow vs. State 240 Md. 121 (1965), Everson vs. Bd. of Education 330 U. S. 1,* and *Torcaso vs. Watkins, 367 U. W. 488 (1961)* It follows inevitably that the requirement is invalid as to judges whose responsibilities to the public and to the persons with whom they deal are far greater.

In the Torcaso case the plaintiff objected to the mandatory requirement of affirming a belief in God as a condition of holding the office of Notary Public. This Court set aside the Maryland constitutional requirement as being in conflict with the United States Constitution. Little difference can be seen in the Torcaso case and the instant case.

In *Zorach vs. Clauson 343 U. S. 306,* this Court gave specific recognition to the proposition that

> "... the Founding Fathers believed devotedly that there was a God and that the unalienable rights of man were rooted in Him is clearly evidenced in their writings, from the Mayflower Compact to the Constitution itself."

Admitting, without conceding, that the devotion was as stated, it becomes equally clear that the wisdom of the Founding Fathers shone with equal brilliance in the writing of Article VI, Clause 3 of the Constitution where religious tests are specifically forbidden. It is one thing to express one's belief, but quite another to require others to believe the same. The Constitution itself has no reference to God. This does not necessarily mean, however, that the writers did not so believe. It does indicate though the preoccupation of the writers with the principle of Separation of State and Church and the freedom of belief and non-belief.

To strike down the mandatory requirement of a belief in God will not give fruition to the fears of those who argue that the

President will no longer be able to pray or to affirm a belief in God or to the many other emotional appeals in the same vein, it will merely return us a step closer to the ideals of our Founding Fathers. Even presidents should have the right not to believe.

CONCLUSION

On the record in this case, the writ of certiorari should be issued to the Court of Appeals for the Fifth Circuit to the end that the questions here presented may be reviewed and determined by this Court in the interests of the orderly administration of justice.

Respectfully submitted,



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Madalyn Murray O'Hair

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15 December 1970

PROOF OF SERVICE

I, James H. Anderson, Jr., attorney for Richard F. O'Hair, and the Society of Separationists, Inc., two of the petitioners herein, and a member of the Bar of the Supreme Court of the United States, hereby certify that, on this 15th day of December, 1970, I served copies of the foregoing Petition for Writ of Certiorari on the several parties thereto, by mailing a copy in a duly addressed envelope, with airmail postage prepaid to:

Madalyn Murray O'Hair, pro se
P.O. Box 2117, Austin, Texas 78767

The Solicitor General
Department of Justice,
Washington, D.C.

Seagal Wheatley,
United States Attorney,
P.O. Box 1017,
San Antonio, Texas 78206

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Attorney for Richard F. O'Hair
Society of Separationists, Inc.

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CONSTITUTIONAL PROVISION AND STATUTES INVOLVED

CONSTITUTION

Article VI of the Constitution of the United States in paragraph (3):

> "The Senators and Representatives before mentioned, and the members of the several State Legislatures, and all executive and judicial officers, both of the United States and of the several States, shall be bound by Oath or affirmation, to support the Constitution; but no religious test shall ever be required as a qualification to any office or public trust under the United States."

First Amendment,

> "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . ."

Fourteenth Amendment, Section 1.

> "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

STATUTES

Public Law 90 – 373, 90th Congress, known as the Nasa Authorization Act.

Public Law 90-373
90th Congress, H. R. 15856
July 3, 1968

An Act

To authorize appropriations to the National Aeronautics and Space Administration for research and development, construction of facilities, and administrative operations, and for other purposes.

Be it enacted by the Senate and House of Representatives of the United States of America in Congress assembled. That there is hereby authorized to be appropriated to the National Aeronautics and Space Administration:

National Aeronautics and Space Administration Authorization Act, 1969.

(a) For "Research and development," for the following programs:

Research and development.

(1) Apollo, $2,925,000,000;
(2) Apollo applications, $253,200,000;
(3) Advanced missions, $2,500,000;
(4) Physics and astronomy, $136,900,000;
(5) Lunar and planetary exploration, $92,300,000;
(6) Biosciences, $33,000,000;
(7) Space applications, $96,700,000;
(8) Launch vehicle procurement, $115,700,000;
(9) Sustaining university program, $9,000,000;
(10) Space vehicle systems, $31,800,000;
(11) Electronics systems, $35,500,000;
(12) Human factor systems, $19,700,000;
(13) Basic research, $21,000,000;
(14) Space power and electric propulsion systems, $42,300,000;
(15) Nuclear rockets, $55,000,000; 82 STAT. 280
(16) Chemical propulsion, $30,200,000; 82 STAT. 281
(17) Aeronautical vehicles, $74,900,000;
(18) Tracking and data acquisition, $289,800,000;
(19) Technology utilization, $3,800,000.

(b) For "Construction of facilities," including land acquisitions, as follows:

Construction of facilities.

(1) Ames Research Center, Moffett Field, California, $386,000;
(2) John F. Kennedy Space Center, NASA, Kennedy Space Center, Florida, $12,100,000;
(3) Manned Spacecraft Center, Houston, Texas, $1,500,000;
(4) Michoud Assembly Facility, New Orleans and Slidell, Louisiana, $400,000;
(5) Wallops Station, Wallops Island, Virginia, $500,000;
(6) Various locations, $23,705,000;
(7) Facility planning and design not otherwise provided for, $1,000,000.

(c) For "Administrative operations," $603,173,000.

Administrative expenses.

(d) Appropriations for "Research and development" may be used (1) for any items of a capital nature (other than acquisition of land) which may be required for the performance of research and development contracts, and (2) for grants to nonprofit institutions of higher education, or to nonprofit organizations whose primary purpose is the conduct of scientific research, for purchase or construction of additional research facilities; and title to such facilities shall be vested in the United States unless the Administrator determines that the national program of aeronautical and space activities will best be served by vesting title in any such grantee institution or organization. Each such grant shall be made under such conditions as the Administrator shall determine to be required to insure that the United States will receive therefrom benefit adequate to justify the making of that grant. None of the funds appropriated for "Research and development" pursuant to this Act may be used for construction of any major facility, the estimated cost of which, including collateral equipment,

Program specifications.

Notice to congressional committees.

exceeds $250,000, unless the Administrator or his designee has notified the Speaker of the House of Representatives and the President of the Senate and the Committee on Science and Astronautics of the House of Representatives and the Committee on Aeronautical and Space Sciences of the Senate of the nature, location, and estimated cost of such facility.

(e) When so specified in an appropriation Act, (1) any amount appropriated for "Research and development" or for "Construction of facilities" may remain available without fiscal year limitation, and (2) maintenance and operation of facilities, and support services contracts may be entered into under the "Administrative operations" appropriation for periods not in excess of twelve months beginning at any time during the fiscal year.

Scientific consultations.

(f) Appropriations made pursuant to subsection 1(e) may be used, but not to exceed $35,000, for scientific consultations or extraordinary expenses upon the approval or authority of the Administrator and his determination shall be final and conclusive upon the accounting officers of the Government.

(g) No part of the funds appropriated pursuant to subsection 1(e) for maintenance, repairs, alterations, and minor construction shall be used for the construction of any new facility the estimated cost of which, including collateral equipment, exceeds $100,000.

Grants prohibited to nonprofit institutions barring Armed Forces recruiters.

82 STAT. 281
82 STAT. 282

(h) No part of the funds appropriated pursuant to subsection (a) of this section may be used for grants to any nonprofit institution of higher learning unless the Administrator or his designee determines at the time of the grant that recruiting personnel of any of the Armed Forces of the United States are not being barred from the premises or property of such institution except that this subsection shall not apply if the Administrator or his designee determines that the grant is a continuation or renewal of a previous grant to such institution which is likely to make a significant contribution to the aeronautical and space activities of the United States. The Secretary of Defense shall furnish to the Administrator or his designee within sixty days after the date of enactment of this Act and each January 30 and June 30 thereafter the names of any nonprofit institutions of higher learning which the Secretary of Defense determines on the date of each such report are barring such recruiting personnel from premises or property of any such institution.

Report to Administrator.

SEC. 2. Authorization is hereby granted whereby any of the amounts prescribed in paragraphs (1), (2), (3), (4), (5), and (6) of subsection 1(b) may, in the discretion of the Administrator of the National Aeronautics and Space Administration, be varied upward 5 per centum to meet unusual cost variations, but the total cost of all work authorized under such paragraphs shall not exceed the total of the amounts specified in such paragraphs.

Transfer of funds.

SEC. 3. Not to exceed one-half of 1 per centum of the funds appropriated pursuant to subsection 1(a) hereof may be transferred to the "Construction of facilities" appropriation, and, when so transferred, together with $10,000,000 of the funds appropriated pursuant to subsection 1(b) hereof (other than funds appropriated pursuant to paragraph (7) of such subsection) shall be available for expenditure to construct, expand, or modify laboratories and other installations at any location (including locations specified in subsection 1(b)), if (1) the Administrator determines such action to be necessary because of changes in the national program of aeronautical and space activities or new scientific or engineering developments, and (2) he determines that deferral of such action until the enactment of the next authorization Act would be inconsistent with the interest of the Nation in aeronautical and space activities. The funds so made available may be

expended to acquire, construct, convert, rehabilitate, or install permanent or temporary public works, including land acquisition, site preparation, appurtenances, utilities, and equipment. No portion of such sums may be obligated for expenditure or expended to construct, expand, or modify laboratories and other installations unless (A) a period of thirty days has passed after the Administrator or his designee has transmitted to the Speaker of the House of Representatives and to the President of the Senate and to the Committee on Science and Astronautics of the House of Representatives and to the Committee on Aeronautical and Space Sciences of the Senate a written report containing a full and complete statement concerning (1) the nature of such construction, expansion, or modification, (2) the cost thereof including the cost of any real estate action pertaining thereto, and (3) the reason why such construction, expansion, or modification is necessary in the national interest, or (B) each such committee before the expiration of such period has transmitted to the Administrator written notice to the effect that such committee has no objection to the proposed action.

Report to congressional committees.

SEC. 4. Notwithstanding any other provision of this Act—

Use of funds, restrictions.

(1) no amount appropriated pursuant to this Act may be used for any program deleted by the Congress from requests as originally made to either the House Committee on Science and Astronautics or the Senate Committee on Aeronautical and Space Sciences,

(2) no amount appropriated pursuant to this Act may be used for any program in excess of the amount actually authorized for that particular program by sections 1(a) and 1(c), and

82 STAT. 262
82 STAT. 263

(3) no amount appropriated pursuant to this Act may be used for any program which has not been presented to or requested of either such committee,

unless (A) a period of thirty days has passed after the receipt by the Speaker of the House of Representatives and the President of the Senate and each such committee of notice given by the Administrator or his designee containing a full and complete statement of the action proposed to be taken and the facts and circumstances relied upon in support of such proposed action, or (B) each such committee before the expiration of such period has transmitted to the Administrator written notice to the effect that such committee has no objection to the proposed action.

Notice to congressional committees.

SEC. 5. (a) No part of the funds appropriated pursuant to this Act shall be available for the payment of any salary of an individual convicted by any Federal, State, or local court of competent jurisdiction of—

Salary payments prohibited to convicted rioters.

(1) inciting a riot or civil disorder;

(2) organizing, promoting, encouraging, or participating in a riot or civil disorder;

(3) aiding or abetting any person in committing any offense specified in clause (1) or (2); or

(4) any offense determined by the Administrator of the National Aeronautics and Space Administration to have been committed in furtherance of, or while participating in, a riot or civil disorder;

if the offense for which he is convicted is a felony. Any such individual holding a position in the National Aeronautics and Space Administration on the date his conviction becomes final shall be removed from such position.

(b) For the purposes of this section, "felony" means any offense for which imprisonment is authorized for a term exceeding one year.

"Felony."

(c) The provisions of subsection (a) shall apply only with respect to acts referred to in clauses (1)-(4) which are committed after the date of enactment of this Act.

Applicability.

geographical distribution of funds.

SEC. 6. It is the sense of the Congress that it is in the national interest that consideration be given to geographical distribution of Federal research funds wherever feasible, and that the National Aeronautics and Space Administration should explore ways and means of distributing its research and development funds wherever feasible.

Short title.

SEC. 7. This Act may be cited as the "National Aeronautics and Space Administration Authorization Act, 1969".

Approved July 3, 1968.

LEGISLATIVE HISTORY:

HOUSE REPORT No. 1181 (Com. on Science & Astronautics).
SENATE REPORT No. 1136 (Com. on Aeronautical & Space Sciences).
CONGRESSIONAL RECORD, Vol. 114 (1968):
May 21 Considered and passed House.
June 6, 10: Considered and passed Senate, amended.
June 18: House concurred in Senate amendment.

THE UNIVERSITY OF TEXAS

AUG 5 1968

LAW LIBRARY

62 Stat. 907 incorporated in 28 U.S.C.A. 453.

> **Oaths of justices and judges.** Each justice or judge of the United States shall take the following oath or affirmation before performing the duties of his office: "I, , do solemnly swear (or affirm) that I will administer justice without respect to persons, and do equal right to the poor and to the rich, and that I will faithfully and impartially discharge and perform all the duties incumbent upon me as according to the best of my abilities and understanding, agreeably to the Constitution and laws of the United States. So help me God." (June 25, 1948, ch. 646, 62 Stat. 907.)

By way of notation, it is pointed out that all justice or judges must also take an oath of office with the same offending oath therein. See 28 U.S.C.A. 3331.

> **Oath of office.** An individual, except the President, elected or appointed to an office of honor or profit in the civil service or uniformed services, shall take the following oath: "I, AB, do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; that I take this obligation freely, without any mental reservation or purpose of evasion; and that I will well and faithfully discharge the duties of the office on which I am about to enter. So help me God." This section does not affect other oaths required by law. (Pub. L. 89-554, Sept. 6, 1966 80 Stat. 424.)

All justices involved with this cause, presently seated, have taken both oaths with the exception of Associate Justice Hugo L. Black, sworn on August 19, 1937, and Associate Justice William O. Douglas, sworn on April 7, 1939.

All such justices complying with these oaths, with the dates taken are:

Supreme Court of the United States

Chief Justice Warren E. Burger ..... June 23, 1969

Associate Justices:

John M. Harlan ..... March 28, 1955
William J. Brenna, Jr. ..... October 16, 1956
Potter Stewart ..... October 14, 1958
Byron R. White ..... April 16, 1962
Thurgood Marshall ..... September 1, 1967
Harry A. Blackmun ..... June 9, 1970

Circuit Court Judges:

Walter P. Gewin 1961
Irving L. Goldberg 1966

David W. Dyer 1961
Adrian A. Spears 1961
Homer Thornberry 1965
District Court Judge
Jack Roberts 1966

Injunction against enforcement of Federal statute; three-judge court required. — An interlocutory or permanent injunction restraining the enforcement, operation or execution of any Act of Congress for repugnance to the Constitution of the United States shall not be granted by any district court or judge thereof unless the application therefor is heard and determined by a district court of three judges under section 2284 of this title. June 25, 1948, c. 646, 62 Stat. 968.

ORDER OF THE THREE-JUDGE COURT

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, AUSTIN, TEXAS, A THREE JUDGE FEDERAL COURT CONSTITUTED TO HEAR AND DETERMINE THIS CAUSE

ORDER

Upon request of the Plaintiffs, this three-judge court was convened in accordance with *Jackson v. Choate*, 404 F. 2d 910 (5 Cir., 1968). This Court, consisting of United States Circuit Judge Homer Thornberry, United States District Judge Adrian A. Spears and United States District Judge Jack Roberts, has determined that this case was not properly a matter for a three-judge determination. *Sardino v. Federal Reserve Bank of New York* 361 F. 2d 106 (2 Cir., 1966); *Pennsylvania Public Utility Commission v. Pennsylvania Railroad Co.*, 383 U.S. 281 (1965).

It is therefore ORDERED that this case be remanded back to the jurisdiction of United States District Judge Jack Roberts, in whose court the complaint is on file, for determination.

Signed at Austin, Texas, this 1st day of December, 1969.

Jack Roberts, United States District Judge, acting for and on behalf of all three judges designated to hear and determine this cause, with full authority from each such judge to so act.

United States District Court,
Western District of Texas,
Austin, Texas, 1 December 19

I, Dan W. Benedict, Clerk of the United States District Court for the Western District of Texas, do certify that the foregoing order constitutes a true and complete record of the Order issued this date in the cause styled Madalyn Murray O'Hair, et al., v. Thomas O. Paine, No. A-69-CA-109.

Dan W. Benedict, Clerk,
by W. E. Lyons, Deputy.

JUDGMENT OF THE DISTRICT COURT

UNITED STATES DISTRICT COURT, WESTERN DISTRICT OF TEXAS, AUSTIN, TEXAS, JACK ROBERTS, UNITED STATES DISTRICT JUDGE

MEMORANDUM OPINION

This is an action brought by Madalyn Murray O'Hair, Richard F. O'Hair, and the Society of Separationists, Inc., against Thomas O. Paine, individually and as Administrator of the National Aeronautics and Space Administration (NASA). The plaintiffs are seeking an order enjoining NASA from (1) doing any act whatsoever which abridges the plaintiffs' freedom from religion or establishes Christianity as the official religion of the United States, and (2) enforcing any policy or regulation which has been heretofore promulgated and which has such above effect. The plaintiffs also seek a temporary restraining order enjoining the defendants "from doing any act whatsoever which restricts or abridges plaintiffs' freedom from religion and specifically enjoining NASA and its administrator and personnel from further directing or permitting religious activities, or ceremonies and especially the reading of the sectarian Christian religion Bible and from prayer recitation in space and in relation to all future space flight activity." Jurisdiction of the case is founded upon 28 U.S.C. §1346 (a) (2).

Upon request of the plaintiffs, a three-judge court was convened in accordance with *Jackson v. Choate* 404 F. 2d 910 (5 Cir.; 1968). That Court, consisting of United States Circuit Judge Homer Thornberry, United States District Judge Adrian A. Spears, and United States District Judge Jack Roberts, determined that this case was not properly a three-judge matter. *Sardino v. Federal Reserve Bank of New York*, 361 F. 2d 106 (2 Cir. 1966); *Pennsylvania Public Utility Commission v. Pennsylvania Railroad Co.*, 383 U.S. 281 (1965). The case was accordingly remanded to Judge Roberts for decision.

The various plaintiffs are Atheists, deists, and believers in the complete separation of church and state. They have asserted the right to bring suit in two separate grounds: (1) taxpayer status; and (2) citizenship status.

In their petition the plaintiffs have alleged that during the Apollo 8 and Apollo 11 Space Flights, certain astronauts, with the consent or

under the orders of NASA, did engage in religious ceremonies in an attempt to establish the Christian religion as the religion of the United States. As a factual basis for such a claim, the plaintiffs have alleged the following: (1) various religious statements were made on television by the astronauts while in space; (2) various items of a religious nature were carried on the spacecraft, thus involving the expenditure of federal funds; (3) certain religious items were deposited on the moon; and (4) the time of the Apollo 8 flight during the Christmas Season was chosen for religious purposes.

The government has filed a motion to dismiss the plaintiffs' suit for the reason, among others, that the complaint fails to state a cause of action for which relief can be granted. For the reasons set out below, this Court so agrees.

I.

The plaintiffs have alleged that their First Amendment right of freedom of religion has been abridged. This Court has searched the pleadings in vain to find any allegation of coercion. The plaintiffs have neither been forced to do anything nor prohibited from doing anything.

Actually, the plaintiffs have not alleged that their freedom of religion has been abridged but rather that their freedom from religion has been abridged. Apparently, the plaintiffs are claiming that they have a right not to be exposed to religion as they were during the televising of the Apollo 8 flights. This, however, does not amount to coercion, and it is necessary to show a coercive effect to constitute an abridgment of the Free Exercise Clause. *Abington School District v. Schempp*, 374 U.S. 203, 223 (1962).

The plaintiffs have alleged that the astronauts were ordered to perform these religious activities. There may be an element of coercion here, but it is irrelevant because the plaintiffs must show that their own Free Exercise rights were abridged and not another's. A litigant may assert only his own constitutional rights or immunities. *United States v. Raines*, 362 U.S. 17, 22 (1959).

II.

In *Abington School District v. Schempp*, supra, the Supreme Court fashioned a test for distinguishing between forbidden involvements of the state with religion and those contacts which the Establishment permits:

> The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or

> inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. p. 222.

And in *Board of Education v. Allen*, 392 U.S. 236, Justice Harlan stated in a concurring opinion the following:

> where the contested governmental activity is calculated to achieve non-religious purposes otherwise within the competence of the State, and where the activity does not involve the State "so significantly and directly in the realm of the sectarian as to give rise to divisive influences and inhibitions of freedom," *Abington*, at 307, it is not forbidden by the religious clauses of the First Amendment.

Relying upon the above guidelines, this Court must conclude that the government did not abridge the Establishment Clause under the facts as alleged by the plaintiffs.

To begin with, the religious statements of the astronauts while on television were made by the astronauts as individuals and not as representatives of the United States government. There is nothing in the pleadings to indicate otherwise. Furthermore, to have prohibited the astronauts from making these statements would have been a violation of their own religious rights.

This same reasoning can be applied to the personal religious items carried by the astronauts of the space flights; this conduct was clearly protected by their own freedom of religion rights. To have prohibited the astronauts from taking these items would surely have violated their own rights, unless of course the space flight would have been jeopardized.

The plaintiffs have alleged that NASA incurred some expense in accommodating the astronauts in this matter and that this was a federal expenditure in furtherance of religion, thus contravening the Establishment Clause. However, both the *Abington*, supra, and the *Allen*, supra, cases stand for the proposition governmental activity which benefits religion is permissible if its primary purpose is secular rather than religious and if its primary effect neither advances nor inhibits religion.

The purpose of NASA is obvious: it is solely to accommodate the astronauts, a perfectly legitimate task especially when one considers the seriousness of the mission. Literally, a national effort, consisting of thousands of people, several billion dollars, and ten years, had been

expended to achieve the goals of the space program. The astronauts were a key factor in the success of this program, and they were undertaking this mission at great risk to their own lives. It is approaching the ludicrous to hold that NASA could not have incurred this minor and incidental expense in order that the astronauts may attain a greater peace of mind in this serious undertaking.

The plaintiffs have also alleged that among the items deposited on the moon were some which had a purely religious significance and that this violated the Establishment Clause. However, there are many public ceremonies which have in them some references to God, and these have been held not to be contrary to the Establishment Clause. In *Engel v. Vitale* 370 U.S. 421 (1962), Justice Black said the following:

> There is of course nothing in the decision reached here that is inconsistent with the fact that school children and others are officially encouraged to express love for our Country by reciting historical documents such as the Declaration of Independence which contains references to the Deity or by singing officially espoused anthems which include the composers' profession of faith in a Supreme Being, or with the fact that there are many manifestations in our public life of belief in God. Such patriotic or ceremonial occasions bear no true resemblance to the unquestioned religious exercises that the State of New York has sponsored in this instance.

And in *Zorach v. Clawson*, 343 U.S. 306, 312,3, Justice Douglas said:

> The First Amendment, however, does not say that in every and all aspects there shall be a separation of Church and State. Rather, it studiously defines the manner, the scientific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise the state and religion would be aliens to each other – hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamation making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths – these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious Atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this honorable Court."

With regard to the scheduling of the Apollo flight during the Christmas season, it is approaching the absurd to say that this is a violation of the Establishment Clause because of the religious significance of that date. The First Amendment does not require the State to be hostile to religion, but only neutral.

For all the above stated reasons, it is hereby ORDERED that the motion to dismiss for failure to state a cause of action be, and is hereby, GRANTED.

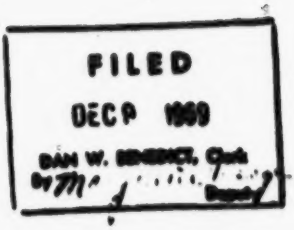
Signed at Austin, Texas, this 1st day of December, 1969.

Jack Roberts, United States District Judge.
United States District Court
Western District of Texas
Austin, Texas, 1 December 1969

I, Dan W. Benedict, Clerk of the United States District Court for the Western District of Texas, do hereby certify that the foregoing constitutes a full, true and correct record of the Memorandum Opinion issued this date in the cause styled Madalyn Murray O'Hair, et al., v. Thomas O. Paine, No. A-69-CA-109.

Dan W. Benedict, Clerk,
by W. E. Lyons, Deputy.

CONCURRING OPINION OF JUDGE HOMER THORNBERRY



UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MADALYN MURRAY O'HAIR, ET AL

V.

THOMAS O. PAINE, ET AL

CIVIL ACTION NO. A-69-CA-109

I hereby concur in the Memorandum Opinion prepared by Honorable Jack Roberts and filed on December 1, 1969

Dated: December 9, 1969.

Homer Thornberry
United States Circuit Judge

CONCURRING OPINION OF JUDGE ADRIAN SPEARS

FILED
DEC 8 1969
DAN W. MOORE, Clerk
By

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF TEXAS
AUSTIN DIVISION

MADALYN MURRAY O'HAIR, ET AL
V.
THOMAS O. PAINE, ET AL

CIVIL ACTION NO. A-69-CA-109

I hereby concur in the Memorandum Opinion prepared by Honorable Jack Roberts, and filed on December 1, 1969.

Dated December 8, 1969.

Adrian A. Spears
United States District Judge

OPINION OF THE SUPREME COURT OF THE UNITED STATES ON APPEAL UNDER 28 U.S.C.A. 1253

SUPREME COURT OF THE UNITED STATES
OCTOBER TERM, 1969
O'HAIR ET AL. v. PAINE ET AL.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

No. 1190. Decided April 6, 1970

PER CURIAM.

The motion to dismiss is granted and the appeal is dismissed for want of jurisdiction.

OPINION OF UNITED STATES COURT OF APPEALS

IN THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 29094
Summary Calendar*

MADALYN MURRAY O'HAIR, ET AL.,
Plaintiffs-Appellants,

versus

THOMAS O. PAINE, ET AL.,
Defendants-Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS

(September 22, 1970)

BEFORE GEWIN, GOLDBERG AND DYER, CIRCUIT JUDGES.

JUDGMENT

This cause came on to be heard on the transcript of the record from the United States District Court for the Western District of Texas, and was taken under submission by the Court upon the record and briefs on file, pursuant to rule 18;

ON CONSIDERATION WHEREOF, It is now here ordered and adjudged by this Court that the judgment of the said District Court in this cause be, and the same is hereby, affirmed;

It is further ordered that plaintiffs-appellants pay to defendants-appellees, the costs on appeal to be taxed by the Clerk of this Court.

September 22, 1970

Issued As Mandate: October 14, 1970

*Rule 18, 5th Cir.; See Isbell Enterprises, Inc. v. Citizens Casualty Co. of New York, et al., 5th Cir., 1970, F.2d , Part 1 [No. 29278, August 14, 1970].

PER CURIAM: Mrs. O'Hair and others appeal from the District Court's dismissal of her complaint for failure to state a claim upon which relief can be granted.[1] We affirm.

Having reviewed the record and construing the complaint in the light most favorable to Mrs. O'Hair, we concur in the District Court's finding: she has stated no claim which would entitle her to relief. *See Conley v. Gibson*, 1957, 355 U.S. 41, 45-46; *Delaware Valley Conservation Ass'n v. Resor*, 3 Cir. 1968, 392 F.2d 331, 335-36, *cert. denied*, 393 U.S. 915; *Pauling v. McElroy*, D.C. Cir. 1960, 278 F.2d 252, *cert. denied*, 364 U.S. 835. Indeed, Mrs. O'Hair's contention concerning the judicial oath *i.e.*, "So help me God" systematically excludes agnostics and atheists from the judiciary approaches absurdity. *Zorach v. Clauson*, 1952, 343 U.S. 306, 312-13; *see Engel v. Vitale*, 1962, 370 U.S. 421, 435 n. 21. Finally appellants have no ascertainable legal interest in regard to the issues which they raise. *Flast v. Cohen*, 1968, 392 U.S. 83, 99; *see Barlow v. Collins*, 1970, 397 U.S. 159, 164; *Association of Data Processing Serv. Organizations, Inc. v. Camp*, 1970, 397 U.S. 150, 153.

AFFIRMED.

1. Specifically she alleges that the National Aeronautics and Space Administration ordered, or authorized, certain astronauts to participate in religious activities during the Apollo 8 and Apollo 11 space flights. Contending that NASA's participation amounted to an unconstitutional abuse of legislative power, she demands injunctory relief. The Supreme Court has already disposed of Mrs. O'Hair's three-judge court argument. *O'Hair v. Paine*, 1970, 397 U.S. 531.